IN THE SUPREME COURT

APPEAL FROM THE MICHIGAN COURT OF APPEALS
MURPHY, P.J. AND GRIFFIN AND METER, JJ.

ESTATE OF BETTY JEAN SHINHOLSTER, Deceased, by **JOHNNIE E. SHINHOLSTER, Personal Representative**,

Plaintiff-Appellee,

v

ANNAPOLIS HOSPITAL, assumed name for **OAKWOOD UNITED HOSPITALS, INC.**, a Michigan Corporation; **ESTATE OF DENNIS E. ADAMS, M.D., Deceased**, by **KATHERINE ADAMS, Personal Representative**; and **MARY ELLEN FLAHERTY, M.D.**,

Defendants-Appellants,

Supreme Court
Nos. 123720, 123721

Court of Appeals
Nos. 225710, 225736

Wayne County Circuit Court
No. 97-709041-NH

APPELLANTS' REPLY BRIEF -- APPELLANTS ESTATE OF DENNIS E. ADAMS, M.D. AND MARY ELLEN FLAHERTY, M.D.

ORAL ARGUMENT REQUESTED

Submitted by:

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STATEMENT OF FACTS

Plaintiff's counter-statement of facts includes two inaccurate or misleading representations which require a brief response. First, on page 3 of the Appellee's Brief, Plaintiff's counsel has stated that on April 10, 1995, Dr. Adams concluded that Mrs. Shinholster's symptoms were "related to *low* blood pressure." (Emphasis in Appellee's Brief) This statement is misleading, as it seems to suggest that Mrs. Shinholster was not really suffering from uncontrolled hypertension at the time of the alleged malpractice, and may, indeed, have been suffering from low blood pressure instead. This suggestion is not supported by the evidence. The Court should recall, in this regard, that Mrs. Shinholster's blood pressure was elevated when she was seen by Dr. Adams on April 7, 1995, and that she was given Procardia at that time to control her hypertension. In the testimony cited in the Appellee's Brief, Dr. Adams expressed his opinion that the symptoms reported on April 10, 1995 were probably caused by a sudden lowering of Mrs. Shinholster's blood pressure from the increased levels that her body had become accustomed to. He testified, however, that her hypertension was still uncontrolled on that date. (Appendix, pp. T. 8-31-99, pp. 65a, 69a-70a, 78a)

On page 7, Plaintiff's counsel has stated that Defendants' experts all agreed that Mrs. Shinholster would not have suffered her fatal stroke if she had been admitted to the hospital by Defendants by April 14, 1995 and given the anticoagulation therapy. On pages 33 and 34, it is claimed that Dr. Rosner and Dr. Walter both agreed with Dr. Frankel's opinion that Mrs. Shinholster *would not have died* if this treatment had been provided. (Emphasis in Appellee's Brief) These claims appear to have been made in an attempt to provide a foundation for Plaintiff's argument that Mrs. Shinholster's "pre-treatment" negligence cannot be considered

a proximate cause of her death. **The difficulty is that these claims are not supported by the evidence.** An examination of the record will reveal that none of the Defendants' experts testified that Mrs. Shinholster would not have suffered the stroke, or that she would not have died, if she had been hospitalized and given anticoagulation therapy.

Dr. Rosner testified that it was possible that Mrs. Shinholster could have survived if she had been admitted to the hospital for anticoagulation therapy on April 10, 1995. (Appendix p. 267a) He later acknowledged that anticoagulation therapy "probably" would have been of "some benefit" if it had been known that Mrs. Shinholster had posterior circulation problems, and that if this had been tried, Mrs. Shinholster "may have survived." (Appendix, pp. 268a-269a; Appellee's Appendix, p. 29b) This, of course, is very different from saying that Mrs. Shinholster would not have died if she had been given anticoagulation therapy.

Dr. Walters merely agreed with Dr. Rosner's opinion that it was possible that Mrs. Shinholster could have survived if she had been admitted to the hospital on April 10, 1995. (Appendix, 338a) He later testified that anticoagulation therapy might, or might not, have been beneficial. (Appendix, pp. 339a-340a)

Dr. Gokli did not testify that Mrs. Shinholster would not have suffered the stroke, or that she would have survived, if anticoagulation therapy had been initiated. Indeed, Dr. Gokli did not say anything even remotely similar to this. To the contrary, Dr. Gokli felt that it would have been malpractice to give Heparin because of Mrs. Shinholster's uncontrolled blood pressure. (Appendix, pp. 394a-396a)

LEGAL ARGUMENT

I. THE DEFENDANTS WERE DENIED A FAIR TRIAL BY THE TRIAL COURT'S INSTRUCTION ON COMPARATIVE NEGLIGENCE, WHICH IMPROPERLY RESTRICTED THE JURY'S CONSIDERATION AND PROPER ALLOCATION OF THE DECEDENT'S COMPARATIVE FAULT.

Plaintiff's counsel begins his argument concerning the trial court's comparative negligence instruction by understating the extent of Mrs. Shinholster's negligence. On page 9, he states that "in April 1994, Mrs. Shinholster's physician, Dr. Normita Vicencio, had prescribed blood pressure medication for her, but Mrs. Shinholster did not always take the blood pressure medication which Dr. Vicencio prescribed." This does not tell the whole story. As noted in the original Appellants' Brief, Mrs. Shinholster was seen by Dr. Vicencio on several occasions in 1994, and three different medications were prescribed for her high blood pressure in April and May of 1994. Dr. Vicencio testified that Mrs. Shinholster had failed to take these medications and to return for follow-up treatment, as directed. When Mrs. Shinholster was seen by Dr. Adams on April 7, 1995, she acknowledged that she had not taken her medication for months. Thus, it is clear that Mrs. Shinholster's noncompliance included both a continuing failure to take prescribed medication and a failure to follow up with additional appointments which were essential for monitoring of her condition.

Having minimized the evidence of Mrs. Shinholster's "pre-treatment" fault, Plaintiff's counsel boldly asserts that this conduct cannot be considered a proximate cause of the ultimate injury because the Defendants' negligence was the proximate cause. (Appellee's Brief, p. 34.) This argument misses the mark for a number of reasons. First, as noted previously, the Defendants offered evidence from which the jury could reasonably have

concluded that Mrs. Shinholster's noncompliance with Dr. Vicencio's instructions contributed as a proximate cause of a single indivisible injury – the stroke which ultimately led to her death. Thus, the question of proximate cause was clearly a question for the jury to decide, absent some basis in Michigan law for the proposed conclusion that this "pre-treatment" noncompliance could not be considered as evidence of comparative fault in this case.[1]

There is no basis in Michigan law for the distinction that Plaintiff proposes. As noted previously, Michigan's statutes now require the jury to consider and apportion all comparative fault – including the plaintiff's fault – which contributes as a proximate cause of the injury. Plaintiff's argument is contrary to this statutory scheme, which holds individuals responsible only to the extent of their individual fault – a scheme which makes no exceptions for medical malpractice cases.

Plaintiff has attempted to avoid this clear statutory requirement by arguing that Mrs. Shinholster's "pre-treatment" failure to comply with Dr. Vicencio's advice cannot be considered a proximate cause under the circumstances presented in this case. This argument is based, in large part, upon the inaccurate claim that all of the Defendants' experts agreed that Mrs. Shinholster would not have died if she had been admitted to the hospital for anticoagulation therapy. As noted previously, this claim is simply untrue.

Plaintiff's argument is also logically unsound. As Defendants have noted previously, there is no logical reason to draw a distinction, for purposes of determining proximate cause, between Mrs. Shinholster's failure to follow instructions given by these Defendants after

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[1] Plaintiff has not disputed that the jury was properly able to consider Mrs. Shinholster's failure to follow medical advice after her first consultation with Dr. Adams on April 7, 1995. The jurors found Mrs. Shinholster's negligence after April 7, 1995 a proximate cause of her death, and thus, it is logical to assume that they could also have found her "pre-treatment" noncompliance a proximate cause of the injury if they had been allowed to consider it.

April 7, 1995 and her failure to follow the same or similar medical advice given by her family physician, Dr. Vicencio, during the year preceding her first contact with the Defendants. Plaintiff's counsel has acknowledged, as he must, that failure to follow medical advice is properly considered evidence of comparative fault when it occurs post-treatment. The rationale is obvious; when a patient fails to follow his doctor's instructions, and that failure contributes to the injury, the patient should be held accountable for the injury resulting from that failure. The same rationale applies with equal force in this case, where Mrs. Shinholster negligently failed to follow the instructions of her family physician. Where, as here, the alleged comparative fault consists of failure to follow medical advice, there is no logical basis for drawing a distinction between the failure to do so before, or after, the initial consultation with the Defendant physicians.

Plaintiff continues to rely upon Podvin v Eickhorst, 373 Mich 175; 128 NW2d 523 (1964) as dispositive authority. Plaintiff's reliance upon Podvin is misplaced because, as noted previously, this issue was simply not addressed or decided at all in that case.[2] The Court's decision in Podvin contains no discussion or analysis of the issue presented in this case, and it must be conceded that the rationale for its holding is unclear.

[2] This is clearly demonstrated by the Court's statement that "**None of the parties to this litigation makes any claim that contributory negligence was an issue in the trial**." 373 Mich at 181 (Emphasis added) It seems evident that if none of the parties had made any claim that contributory negligence was an issue, none of the parties had argued to the Court that the plaintiff's fault for causing the automobile accident was relevant to the issues being tried. Plaintiff seems to assume that the Court's decision in Podvin was based upon an unstated finding that evidence of the plaintiff's negligence was inadmissible as evidence of contributory negligence. It is equally likely that the Court's decision was based upon a finding that defense counsel's argument was unfairly prejudicial in light of the fact that contributory negligence was not claimed to be an issue in the case.

Moreover, the Court should note that there are two important distinctions between Podvin and the case at bar. First, Podvin did not involve any failure on the plaintiff's part to comply with medical advice.[3] Second, as noted previously, Podvin was decided at a time when the harsh doctrine of contributory negligence barred all recovery in cases where the plaintiffs' fault, however slight, contributed as a proximate cause of the injury. Plaintiff's counsel has suggested that the subsequent abandonment of that doctrine has no significance, but the Defendants must disagree. There is, of course, a drastic difference between the harsh doctrine of contributory negligence and the more equitable doctrine of comparative negligence, which allows recovery based upon individual fault. Thus, if the issue of "pre-treatment" negligence was considered by the Court as a basis for its decision in Podvin, it is reasonable to assume that its decision may have been motivated by a desire to ameliorate the harsh results flowing from application of the contributory negligence doctrine. The subsequent abrogation of that doctrine cannot be ignored when assessing the continuing validity of any rule established in that case.

II. THE TRIAL COURT ERRONEOUSLY APPLIED THE HIGHER STATUTORY CAP ON NONECONOMIC DAMAGES IN THIS WRONGFUL DEATH CASE, WHERE THE DECEDENT WAS NO LONGER SUFFERING FROM ANY OF THE PERMANENT CONDITIONS REQUIRING APPLICATION OF THE HIGHER CAP.

Plaintiff's counsel has continued to suggest that "The temporal frame of reference provided in the statute is obviously associated with the defendant's acts of negligence." (Appellee's Brief, p. 39.) Thus, he suggests that "the precise question which must be

[3] The plaintiff's negligence in Podvin consisted of negligent driving, causing the accident which had provided the need for medical treatment. Under these circumstances, the Court, and the parties, may very well have considered the necessary causal relationship to be lacking.

answered to determine the appropriate cap under § 1483(1) is whether *as of April 1995* when the defendants committed their acts of professional negligence, the jury could conclude that "as the result of the negligence of one or more of the defendants," Mrs. Shinholster *is* hemiplegic, paraplegic, or quadriplegic as a result of a brain injury. Alternatively, the statute compels consideration of the question of whether as of April 1995, Mrs. Shinholster *has* permanently impaired cognitive capacity." (Appellee's Brief, p. 39 - emphasis in Appellee's Brief) Thus, Plaintiff has proposed that the Legislature envisioned an inquiry as to whether, at a time in the past, the alleged victim of malpractice **is** hemiplegic, paraplegic, or quadriplegic as a result of a brain injury or **has** permanently impaired cognitive capacity. Clearly, if this had been intended, the Legislature would have employed past-tense verbs to describe patient's condition. Plaintiff's proposed interpretation requires an assumption that the Legislature consciously chose to express its intent in a grammatically incorrect manner. Clearly, there is no basis for such an assumption.

Plaintiff's reliance upon Michalski v Bar-Levav, 463 Mich 723; 625 NW2d 754 (2001), is misplaced since the question of statutory construction arose, in that case, in an entirely different context. The language at issue in that case pertained to the threshold determination of whether the defendant was guilty of unlawful discrimination under the Handicappers' Civil Rights Act, and the context clearly referred to events occurring at the time of the alleged discrimination. It had nothing to do with the measure or limitation of damages for the discrimination alleged. In this case, the question of statutory construction has nothing to do with the nature or timing of the allegedly negligent treatment. The question is which of the two statutory caps must be applied to the damages awarded in the calculation of the judgment. Indeed, Michalski supports Defendants' argument because it is a good example

of a case where this Court found the tense of the statutory language controlling, and applied the statute as written.

Plaintiff has also suggested that the question of statutory interpretation is immaterial because the higher cap would apply in any event because Mrs. Shinholster, being deceased, satisfies the statutory criteria for application of the higher cap. This suggestion is plainly contrary to the Legislature's intent.

As Defendants have noted previously, a deceased individual no longer exists, except in memory, and thus does not continue to "be" anything tangible. Nor does the deceased individual continue to "have" any condition, permanent or otherwise. Although it may be said that a deceased person has lost the function of his or her limbs, cognitive abilities, and ability to procreate, it is not reasonable to assume that the Legislature would have defined death in such a circuitous fashion, particularly where death was once specifically made an exception to the cap, and that exception was purposefully eliminated by the 1993 legislation.

Indeed, the legislative history of the 1993 legislation clearly demonstrates that the three exceptions requiring application of the higher cap were intended to apply to living plaintiffs. The Court should note, in this regard, that the Bill Substitute (H-1) reported by the House Judiciary Committee included cases where "there has been a death" among the proposed exceptions requiring application of the higher cap. The Bill Substitute (H-2), subsequently adopted on the House floor on April 21, 1993, did not include death as an exception requiring application of the higher cap.[4] Later, efforts were made to amend the Bill Substitute (H-2) to include cases where "there has been a death" among the exceptions

[4] Copies of the pertinent pages of the Bill Substitutes (H-1) and (H-2) are attached as Appendices "A" and "B," respectively.

requiring application of the higher cap. These attempts were unsuccessful. (See 1993 House Journal, pp. 953, 994-995, 1005-1007) All of this clearly suggests that the statutory exceptions requiring application of the higher cap were never intended to apply, in wrongful death cases, to a deceased victim of malpractice.

III. THE TRIAL COURT ERRONEOUSLY DETERMINED THAT IT WAS NOT REQUIRED TO REDUCE THE JURY'S AWARD OF FUTURE DAMAGES TO PRESENT VALUE IN THIS CASE.

Defendants have previously argued that the "plaintiff" referred to in MCL 600.6311 may also refer to the decedent's estate, and that in that event, the exception provided in § 6311 would apply in this case because the estate is a separate legal entity which is much less than 60 years old. Plaintiff has responded that this argument is untenable because the wrongful death statute required that the action be brought by, and in the name of, the personal representative. The Defendants contend that this criticism is misplaced, as the estate is the real party in interest, even though the action must be brought, on its behalf, by the personal representative.

This important point has been illustrated by the recent decision of the Court of Appeals in Shenkman v Bragman, ___ Mich App ___; ___ NW2d ___ (Docket No. 243942 *rel'd* 3-30-04)[5] In that case, the Court of Appeals upheld the trial court's order dismissing a wrongful death action which had been brought by the personal representative, a non-lawyer, *in pro per.* The Court agreed that the personal representative had been engaged in the unauthorized practice of law. In so ruling, the Court held that the provisions of MCR 2.201(B) "more clearly state what the statute contemplates, albeit less clearly, that a personal

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[5] A copy of the Shenkman decision is attached as Appendix "C."

representative is a separate entity from the estate served and that the estate, not the personal representative, remains "the real party in interest. . . for whose benefit the action is brought." (Appendix "C" p. 3)

RELIEF

WHEREFORE, Defendants-Appellants Mary Ellen Flaherty, M.D. and Katherine Adams, Personal Representative of the Estate of Dennis E. Adams, M.D., Deceased, respectfully request that this Honorable Court reverse the erroneous decisions of the lower courts and remand this matter to the Wayne County Circuit Court for a new trial. Alternatively, Defendants request that this matter be remanded to the trial court with instructions to enter an Amended Judgment limiting the award of noneconomic damages in accordance with the lower cap on noneconomic damages provided in MCL 600.1483, and reflecting a reduction of all future damages to present value in accordance with MCL 600.6306(c) and (e).

Respectfully submitted,

FRASER TREBILCOCK DAVIS & DUNLAP, P.C.

Attorneys for Defendants—Appellants
Mary Ellen Flaherty, M.D. and Katherine Adams, Personal Representative of the Estate of Dennis E. Adams, M.D., Deceased

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Dated: April 19, 2004

APPENDIX "A"

(6) THE METHOD OF COMPENSATION USED BY AN INDIVIDUAL ATTORNEY IS THE ATTORNEY'S OPTION, AND THIS SECTION DOES NOT REQUIRE AN ATTORNEY TO ACCEPT COMPENSATION IN A MANNER OTHER THAN THAT CHOSEN BY THE ATTORNEY.

(7) AN ATTORNEY WHO ENTERS INTO A CONTINGENCY FEE AGREEMENT THAT VIOLATES SUBSECTION (2) IS BARRED FROM RECOVERING A FEE IN EXCESS OF THE ATTORNEY'S REASONABLE ACTUAL ATTORNEY FEES BASED ON HIS OR HER USUAL AND CUSTOMARY HOURLY RATE OF COMPENSATION, UP TO THE LIMITATIONS SET FORTH IN SUBSECTION (2), BUT THE OTHER PROVISIONS OF THE CONTINGENCY FEE AGREEMENT REMAIN ENFORCEABLE.

Sec. 1483. (1) ~~In~~ SUBJECT TO SUBSECTION (2), IN an action for damages alleging medical malpractice BY OR against a person or party, ~~specified in section 5838a,~~ damages for noneconomic loss ~~which exceeds $225,000.00 shall not be awarded unless 1 or more of the following circumstances exist:~~

~~(a) There has been a death.~~

~~(b) There has been an intentional tort.~~

~~(c) A foreign object was wrongfully left in the body of the patient.~~

~~(d) The injury involves the reproductive system of the patient.~~

~~(e) The discovery of the existence of the claim was prevented by the fraudulent conduct of a health care provider.~~

~~(f) A limb or organ of the patient was wrongfully removed.~~

~~(g) The patient has lost a vital bodily function.~~ SHALL NOT EXCEED $500,000.00 UNLESS 1 OR MORE OF THE FOLLOWING EXCEPTIONS

APPLY, IN WHICH CASE DAMAGES FOR NONECONOMIC LOSS SHALL NOT EXCEED $1,000,000.00:

(A) THERE HAS BEEN A DEATH.

(B) THE PLAINTIFF HAS A PERMANENT DISABILITY RESULTING FROM 1 OR MORE OF THE FOLLOWING:

(*i*) INJURY TO THE BRAIN.

(*ii*) INJURY TO THE SPINAL CORD.

(C) THERE HAS BEEN PERMANENT LOSS OF OR DAMAGE TO A REPRODUCTIVE ORGAN RESULTING IN THE INABILITY TO PROCREATE.

(D) THERE HAS BEEN ALTERATION, DESTRUCTION, OR FALSIFICATION OF A MEDICAL RECORD OR CHART IN VIOLATION OF SECTION 492A OF THE MICHIGAN PENAL CODE, ACT NO. 328 OF THE PUBLIC ACTS OF 1931, BEING SECTION 750.492A OF THE MICHIGAN COMPILED LAWS.

(2) IF A DEFENDANT OFFERS TO THE COURT SATISFACTORY EVIDENCE OF COMPLIANCE WITH THE FINANCIAL RESPONSIBILITY REQUIREMENTS OF SECTION 16280 OF THE PUBLIC HEALTH CODE, ACT NO. 368 OF THE PUBLIC ACTS OF 1978, BEING SECTION 333.16280 OF THE MICHIGAN COMPILED LAWS, THE LIMITATIONS ON DAMAGES FOR NONECONOMIC LOSS SET FORTH IN SUBSECTION (1) ARE REDUCED BY 50%.

(3) ~~(2)~~ In awarding damages in an action alleging medical malpractice, the trier of fact shall itemize damages into DAMAGES FOR economic LOSS and ~~noneconomic~~ damages FOR NONECONOMIC LOSS.

(4) ~~(3) "Noneconomic~~ AS USED IN THIS SECTION, "NONECONOMIC loss" means damages or loss due to pain, suffering, inconvenience, physical impairment, physical disfigurement, or other noneconomic loss.

(5) ~~(4)~~ The STATE TREASURER SHALL ADJUST THE limitation on ~~noneconomic~~ damages FOR NONECONOMIC LOSS set forth in subsection (1) ~~shall be increased~~ by an amount determined by the state treasurer at the end of each calendar year to reflect the cumulative annual percentage ~~increase~~ CHANGE in the consumer price index. As used in this subsection, "consumer price index" means the most comprehensive index of consumer prices available for this state from the bureau of labor statistics of the United States department of labor.

Sec. 2169. (1) In an action alleging medical malpractice, ~~if the defendant is a specialist,~~ a person shall not give expert testimony on the appropriate standard of PRACTICE OR care unless the person is ~~or was a physician~~ licensed ~~to practice medicine or osteopathic medicine and surgery or a dentist licensed to practice dentistry~~ AS A HEALTH PROFESSIONAL in this STATE or another state and meets ~~both of~~ the following criteria:

(a) ~~Specializes, or specialized~~ IF THE PARTY AGAINST WHOM THE TESTIMONY IS OFFERED IS A SPECIALIST, SPECIALIZES at the time of the occurrence ~~which~~ THAT is the basis for the action ~~,~~ in the same OR A SUBSTANTIALLY SIMILAR specialty ~~or a related, relevant area of medicine or osteopathic medicine and surgery or dentistry as the specialist who is the defendant in the medical malpractice action~~ AS THE PARTY AGAINST WHOM THE TESTIMONY IS OFFERED. HOWEVER, IF THE PARTY AGAINST WHOM THE TESTIMONY IS OFFERED IS A SPECIALIST CERTIFIED BY THE AMERICAN BOARD OF

APPENDIX "B"

and section 5851 as amended by Act No. 178 of the Public Acts of 1986 and section 6013 as amended by Act No. 50 of the Public Acts of 1987, being sections 600.1483, 600.2169, 600.2912a, 600.2912d, 600.2912e, 600.5838a, 600.5851, 600.5856, 600.6013, and 600.6304 of the Michigan Compiled Laws, are amended and sections 2912b, 2912f, 2912g, and 2912h are added to read as follows:

Sec. 1483. (1) In an action for damages alleging medical malpractice BY OR against a person or party, ~~specified in section 5838a,~~ THE TOTAL AMOUNT OF damages for noneconomic loss ~~which exceeds $225,000.00 shall not be awarded unless 1 or more of the following circumstances exist:~~

~~(a) There has been a death.~~

~~(b) There has been an intentional tort.~~

~~(c) A foreign object was wrongfully left in the body of the patient.~~

~~(d) The injury involves the reproductive system of the patient.~~

~~(e) The discovery of the existence of the claim was prevented by the fraudulent conduct of a health care provider.~~

~~(f) A limb or organ of the patient was wrongfully removed.~~

~~(g) The patient has lost a vital bodily function.~~ RECOVERABLE BY ALL PLAINTIFFS, RESULTING FROM THE NEGLIGENCE OF ALL DEFENDANTS, SHALL NOT EXCEED $280,000.00 UNLESS, AS THE RESULT OF THE NEGLIGENCE OF 1 OR MORE OF THE DEFENDANTS, 1 OR MORE OF THE FOLLOWING EXCEPTIONS APPLY AS DETERMINED BY THE COURT PURSUANT TO SECTION 6304, IN WHICH CASE DAMAGES FOR NONECONOMIC LOSS SHALL NOT EXCEED $500,000.00:

(A) THE PLAINTIFF IS HEMIPLEGIC, PARAPLEGIC, OR QUADRIPLEGIC RESULTING IN A TOTAL PERMANENT FUNCTIONAL LOSS OF 1 OR MORE LIMBS CAUSED BY 1 OR MORE OF THE FOLLOWING:

(*i*) INJURY TO THE BRAIN.

(*ii*) INJURY TO THE SPINAL CORD.

(B) THE PLAINTIFF HAS PERMANENTLY IMPAIRED COGNITIVE CAPACITY RENDERING HIM OR HER INCAPABLE OF MAKING INDEPENDENT, RESPONSIBLE LIFE DECISIONS AND PERMANENTLY INCAPABLE OF INDEPENDENTLY PERFORMING THE ACTIVITIES OF NORMAL, DAILY LIVING.

(C) THERE HAS BEEN PERMANENT LOSS OF OR DAMAGE TO A REPRODUCTIVE ORGAN RESULTING IN THE INABILITY TO PROCREATE.

(2) In awarding damages in an action alleging medical malpractice, the trier of fact shall itemize damages into DAMAGES FOR economic LOSS and ~~noneconomic~~ damages FOR NONECONOMIC LOSS.

(3) ~~"Noneconomic~~ AS USED IN THIS SECTION, "NONECONOMIC loss" means damages or loss due to pain, suffering, inconvenience, physical impairment, physical disfigurement, or other noneconomic loss.

(4) The STATE TREASURER SHALL ADJUST THE limitation on ~~noneconomic~~ damages FOR NONECONOMIC LOSS set forth in subsection (1) ~~shall be increased~~ by an amount determined by the state treasurer at the end of each calendar year to reflect the cumulative annual percentage ~~increase~~ CHANGE in the consumer price index. As used in this subsection, "consumer price index" means the most comprehensive index of consumer prices available

for this state from the bureau of labor statistics of the United States department of labor.

Sec. 2169. (1) In an action alleging medical malpractice, ~~if the defendant is a specialist,~~ a person shall not give expert testimony on the appropriate standard of PRACTICE OR care unless the person is ~~or was a physician~~ licensed ~~to practice medicine or osteopathic medicine and surgery or a dentist licensed to practice dentistry~~ AS A HEALTH PROFESSIONAL in this STATE or another state and meets ~~both of~~ the following criteria:

(a) ~~Specializes, or specialized~~ IF THE PARTY AGAINST WHOM OR ON WHOSE BEHALF THE TESTIMONY IS OFFERED IS A SPECIALIST, SPECIALIZES at the time of the occurrence ~~which~~ THAT is the basis for the action ~~,~~ in the same specialty ~~or a related, relevant area of medicine or osteopathic medicine and surgery or dentistry as the specialist who is the defendant in the medical malpractice action~~ AS THE PARTY AGAINST WHOM OR ON WHOSE BEHALF THE TESTIMONY IS OFFERED. HOWEVER, IF THE PARTY AGAINST WHOM OR ON WHOSE BEHALF THE TESTIMONY IS OFFERED IS A SPECIALIST WHO IS BOARD CERTIFIED, THE EXPERT WITNESS MUST BE A SPECIALIST WHO IS BOARD CERTIFIED IN THAT SPECIALTY.

(b) ~~Devotes, or devoted at the time~~ SUBJECT TO SUBDIVISION (C), DURING THE YEAR IMMEDIATELY PRECEDING THE DATE of the occurrence ~~which~~ THAT is the basis for the CLAIM OR action, DEVOTED a ~~substantial portion~~ MAJORITY of his or her professional time to EITHER OR BOTH OF the FOLLOWING:

APPENDIX "C"

STATE OF MICHIGAN

COURT OF APPEALS

KEVIN SHENKMAN, Personal Representative of the Estate of SAMUEL PRYOR, Deceased,

Plaintiff-Appellant,

v

JAMES B. BRAGMAN, D.O., d/b/a JAMES BENNETT BRAGMAN, D.O., P.C.,

Defendant-Appellee.

FOR PUBLICATION
March 30, 2004
9:00 a.m.

No. 243942
Oakland Circuit Court
LC No. 00-024196-NM

Before: Sawyer, P.J., and Saad and Bandstra, JJ.

BANDSTRA, J.

This matter has been remanded to us from the Supreme Court for consideration as on leave granted. Plaintiff is the personal representative of his grandfather's estate and brought this wrongful death action against defendant without employing an attorney to do so. The lower court concluded that plaintiff was thus engaged in the unauthorized practice of law and, as a result, dismissed the complaint without prejudice. The sole issue before us is, therefore, whether plaintiff was engaged in the unauthorized practice of law under these facts. We conclude that he was and affirm the lower court order dismissing his complaint.

This case involves the construction of a statute, the wrongful death act, MCL 600.2922. Thus, it involves a question of law that we review de novo. *In re Kubiskey Estate*, 236 Mich App 443, 447-448; 600 NW2d 439 (1999). When construing a statute, this Court must consider the object of the statute and apply a reasonable construction that best accomplishes the statute's purpose. *Marquis v Hartford Accident & Indemnity (After Remand)*, 444 Mich 638, 644; 513 NW2d 799 (1994). Moreover, in doing so we must read each statutory provision in the context of the entire statute, so as to produce a harmonious whole. *Macomb Co Prosecutor v Murphy*, 464 Mich 149, 159; 627 NW2d 247 (2001).

Plaintiff relies heavily on language from the statute indicating that a wrongful death action "shall be brought by, and in the name of, the personal representative" of the decedent's estate. MCL 600.2922(2). This language has never been construed in any precedent considering the question or facts at issue here. Further, we find totally inapposite the few cases that the litigants claim are analogous or otherwise helpful.

Instead, we find some guidance in the statutory scheme into which this language fits:

(1) Whenever the death of a person or injuries resulting in death shall be caused by wrongful act, neglect, or fault, of another and the act, neglect, or fault is such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages, the person who or the corporation that would have been liable, if death had not ensued, shall be liable to an action for damages, notwithstanding the death of the person injured, and although the death was caused under circumstances that constitute a felony.

(2) Every action under this section shall be brought by, and in the name of, the personal representative of the estate of the deceased person. Within 30 days after the commencement of an action, the personal representative shall serve a copy of the complaint and notice as prescribed in subsection (4) upon the person or persons who may be entitled to damages under subsection (3) in the manner and method provided in the rules applicable to probate court proceedings.

(3) Subject to sections 2802 to 2805 of the estates and protected individuals code, 1998 PA 386, MCL 700.2802 to 700.2805, the person or persons who may be entitled to damages under this section shall be limited to any of the following who suffer damages and survive the deceased:

(a) The deceased's spouse, children, descendants, parents, grandparents, brothers and sisters, and, if none of these persons survive the deceased, then those persons to whom the estate of the deceased would pass under the laws of intestate succession determined as of the date of death of the deceased.

(b) The children of the deceased's spouse.

(c) Those persons who are devisees under the will of the deceased, except those whose relationship with the decedent violated Michigan law, including beneficiaries of a trust under the will, those persons who are designated in the will as persons who may be entitled to damages under this section, and the beneficiaries of a living trust of the deceased if there is a devise to that trust in the will of the deceased.

Under these provisions, a person or corporation who would otherwise be liable for a death remains so even though the "party injured" is no longer able to "maintain an action," being deceased. MCL 600.2922(1). That person or corporation is liable to the heirs of the decedent's estate who suffer damages as a result of the death. MCL 600.2922(3). However, subsection (3) does not authorize those heirs to themselves bring an action. Instead, subsection (2) says that the action "shall be brought by, and in the name of, the personal representative of the estate."

Viewed in this context, the subsection (2) language appellant relies on is best understood as merely establishing the process by which damage liability, preserved notwithstanding the death that gives rise to the statute's operation, must be pursued. The estate, not the heirs, may bring an action and, as with other matters involving the estate, the duly appointed personal representative acts for, or represents, the estate. See, e.g., MCL 700.3703(1) (a personal

representative is a fiduciary who must act to advance the best interests of the estate). It is in that sense that the estate's action is "brought by, and in the name of," the personal representative. That the estate's cause of action is "brought by, and in the name of," the personal representative does not mean, however, that the cause of action transfers over to, or becomes the right of, the personal representative.

We note that this analysis comports with MCR 2.201. Although actions must generally be "prosecuted in the name of the real party in interest," MCR 2.201(B), a "personal representative . . . may sue in his or her own name without joining the party for whose benefit the action is brought," MCR 2.201(B)(1). These provisions more clearly state what the statute contemplates, albeit less clearly, that a personal representative is a separate entity from the estate served and that the estate, not the personal representative, remains "the real party in interest . . . for whose benefit the action is brought." MCR 2.201(B), MCR 2.201(B)(1).

And this presents the fatal flaw in appellant's argument. That argument is premised on his constitutional right as a non-lawyer to represent himself "in his own proper person." Const 1963, art 1, § 13. We acknowledge that right. However, under the statute as we analyze it, appellant is not the true plaintiff here; the estate is. Appellant is not, in other words, representing himself in this litigation. Instead, he is representing a client, the estate. Thus, he is engaged in the unauthorized practice of law. MCL 600.916. The trial court did not err in so concluding.

We affirm.

/s/ Richard A. Bandstra
/s/ David H. Sawyer
/s/ Henry William Saad